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# The Settlement of Disputes in the Arab World: Arbitration and Other Methods\*

by  
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In the countries of the Arab Middle East the options available to parties in dispute are no different—on the face of it at least—from the conventional options in the West: proceedings before the ordinary courts, arbitration and conciliation. The countries of the Arab Middle East as defined for present purposes are Syria, Lebanon, Jordan, Iraq, Egypt, Libya, Kuwait, Bahrain, Saudi Arabia, Qatar, the United Arab Emirates, Oman and the Republic of North Yemen. Setting aside the uncertainties of proceedings before the ordinary courts, this article makes a brief examination of arbitration and conciliation/mediation, in the light of the following questions:

- (1) Which categories of dispute call for arbitration and which for conciliation?
- (2) What are the current trends in legislation and case law in relation to domestic arbitration as such and to foreign and international arbitration?
- (3) What steps could be taken to make international arbitration more readily acceptable to Arab parties?

The answers given below do not stem exclusively from analysis of particular situations but are mainly based on an overview of common denominators in an attempt to identify general trends in the region as a whole.

## FIRST QUESTION: WHICH CATEGORIES OF DISPUTE CALL FOR ARBITRATION AND WHICH FOR CONCILIATION?

The first point to be established in reply to this question is that the majority of commercial disputes are settled by recourse to the ordinary courts. In the case of disputes between nationals of the same country, the next most common method of settlement is conciliation/mediation. This was the method preferred by the Prophet, who made it plain that he was sceptical of judicial proceedings, which were devised by man and therefore fallible. Parties who won their cases by dint of eloquence at the expense of truth were threatened with the direst sanctions. As the Prophet said:

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If you bring your dispute before me and one of you pleads more eloquently than the other, so that his eloquence alone persuades me to find in his favor, he will do well to return to his opponent what I have awarded him, for I shall have awarded him a part of hell.

Conciliation/mediation, the course recommended by the Prophet, is still in use to this day. It continues to enjoy favor in the Islamic world. Application of this method, the essence of which is distilled in Article 1850 of the *Majalla*,<sup>1</sup> is regarded as a demonstration of solidarity between Moslems, as observance of the religious duty of members of the community to remain at peace with one another. It involves either a direct settlement between the two parties or the intervention of third parties, whose mandate can be terminated and who bring their authority and diplomacy to bear in settling the parties' differences and recording a compromise agreement between them. This latter practice is commonly confused with arbitration by "amiable composition" in many Arab Middle East countries, especially the Gulf States and Saudi Arabia. Arbitration by "amiable composition," even where clear legislative provision is made for it, is still understood and practiced as conciliation by a nominated third party, who tends to adopt a role more akin to that of a mediator sanctioning an agreement between the parties; his decision is final, although his mandate can be terminated before he gives it, since he is acting on the parties' instructions. North Yemen is perhaps the only country which has made legislative provision for conciliation by a third party. The Arab Middle East countries which have been influenced by French law, such as Syria, Egypt, Lebanon and Kuwait (the last-named via Egypt) have incorporated the principle of "amiable composition" into their legislation, but it is often a mediated settlement which comes to the surface, especially in Kuwait and Syria. This confirms the strength of local traditions and their predominance over Western-inspired legislation.<sup>2</sup>

This tendency to resort to a mediation settlement is not generally found in the case of commercial or civil disputes in which one of the parties is a foreign natural or legal person. Here, the norm is recourse to arbitration. Unlike arbitration under Islamic law, such arbitration is not spontaneous: whether domestic, international or foreign, it is triggered by an arbitration clause which the Arab party has signed and probably lost sight of since. It is a common occurrence for the Arab party to seem to be taken by surprise by a request for arbitration. To the Arab way of thinking, arbitration—whether foreign, international or even domestic—is regarded as a concession to the

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1. Article 1850 of the *Majalla*: "The legally appointed arbitrators may validly effect a conciliation between the parties if so authorized by the parties. Thus, if each of the parties has authorized one of the arbitrators to effect a conciliation between them and such arbitrators dispose of the matter in dispute by a settlement in conformity with the terms of the Book of Settlements, the parties shall be bound by such settlement."

2. It should be noted that arbitration by "amiable composition" (friendly arbitration) is not recognized under Islamic law. A dispute is resolved either by arbitration according to the law or by a settlement reached between the parties themselves or through a mediator authorized to make a settlement.

foreign party. Domestic arbitration will be seen by the Arab party as depriving him of the right to be heard by his duly appointed judges. International or foreign arbitration is generally held on alien territory according to foreign rules of procedure and substantive laws and before a majority of foreign arbitrators. It can almost be said that it is only when left with no alternative—and then racked by apprehension—that an Arab party will comply with an arbitration clause. He will sometimes attempt to have it declared null and void by the courts in his own country. Depending on circumstances, he will dispute the arbitrators' jurisdiction and, if in extreme panic, will attempt to challenge them. If he is the more powerful party economically, he will try to ensure, when the contract is being drafted, that any arbitration clause incorporated into it is governed by local domestic laws.

This rather somber background of custom and practice is fortunately somewhat relieved by more positive developments in legislation and case law.

SECOND QUESTION: WHAT ARE THE CURRENT TRENDS IN LEGISLATION  
AND CASE LAW IN RELATION TO DOMESTIC ARBITRATION AS  
SUCH AND TO FOREIGN AND INTERNATIONAL  
ARBITRATION?

On the whole, the trend in legislation is favorable to arbitration. A rapid survey of domestic arbitration reveals that:

- (1) the validity in principle of the arbitration agreement is recognized in almost all the countries of the Arab Middle East, the exceptions being Qatar, which does not yet have legislation on arbitration, and North Yemen, where the arbitration clause is not yet recognized; all the others, including Oman and Saudi Arabia, recognize the validity in principle of the arbitration agreement, including the arbitration clause;
- (2) the irrevocability of the appointment of arbitrators is also recognized virtually everywhere, the exceptions being Qatar, in the absence of legislation on the subject, and North Yemen where, in keeping with Islamic tradition, the mandate of a mediator/conciliator can be terminated at any time.

Despite adverse factors, the overall trend in legislation can be seen to be positive, given that both the validity of the arbitration clause and the irrevocability of the appointment of arbitrators have even been recognized in Oman and Saudi Arabia, still strongly influenced by Islamic law, where neither the concept of the arbitration clause nor the irrevocability of the appointment of arbitrators is recognized under their common law, Islamic law.

However, although the legislative trend is favorable, there are a number of features which typify a mentality unreceptive to international or foreign arbitration:

- (1) Arbitration is still thought of as an *ad hoc* arrangement in which the choice of a specific person is a key consideration and, fairly often, as one which does not lend itself to collective decision-making. There are some examples of institutionalized arbitration, but the purposes for which it is

organized differ from those envisaged in the West. In other words, institutionalized arbitration is not looked to for its intrinsically beneficial effects. This point can be illustrated by a few examples. In Kuwait, for instance, a partially institutionalized form of arbitration operates under the control of the Ministry of Justice and the Court for First Instance. The chairman of each arbitral tribunal is chosen by the Court of First Instance from among the judges, and the other arbitral tribunal members are selected from a list drawn up by the Ministry of Justice. Arbitration under this scheme is free of charge, its primary aim being to reduce the costs of arbitration. It is not essentially institutional, but a derivative of ordinary arbitration, the costs of which are beyond the means of some parties. In Libya, the establishment of People's Regional Committees to arbitrate in small civil and commercial cases between Libyan citizens seems to have been motivated by the desire to exercise political control much more than by any wish to institutionalize arbitration. An ostensibly institutionalized form of arbitration, which is apparently compulsory in Saudi Arabia and Oman, amounts in reality to the establishment of judicial supervision over private arbitration rather than institutionalization for the purposes of facilitating arbitration proceedings. The implementation rules for arbitration recently published in Saudi Arabia unfortunately confirm this trend.

- (2) In countries like Saudi Arabia and Oman, an arbitration clause is apparently not fully effective unless it has been sanctioned by the local courts. Supervision by the local courts thus seems to be a compulsory prerequisite to arbitration proceedings. This system, which is peculiar to Oman and Saudi Arabia, approximates the system in Abu Dhabi in the United Arab Emirates, where arbitration is under the tight supervision of the courts.

In addition to these features, other factors are quite commonly found to be militating against the generally favorable trend in legislation: the hostility of recently constituted courts which fear competition from arbitration, which has always performed a secondary role in the traditional Moslem system; in addition, because of the exalted role of the state in some countries where the law is under the control of the leaders, the latter are more at ease with the judiciary, which is not familiar with the separation of powers.

These brief details with regard to domestic arbitration will have anticipated the potential obstacles with regard to international and foreign arbitration, and bring us to the second half of this question.

Here again, of necessity, no more than partial insights can be given. It would be pretentious at this stage to draw any absolute or general conclusions in the context of such a changing situation. The most striking feature is the lack of distinction in status between domestic arbitration and international arbitration. Only in the recent Lebanese legislation (in force since 1 January 1985) is this distinction made. In the countries of the Arab Middle East the effect in practice of this lack of distinction is a "nationalization" of international arbitration, a kind of phagocytosis of the international by the local, as was seen in the case of oil installations. To look no further than the arbitration clause, and without at this stage going into the uncertain meanders of case law in Egypt, it can be stated that the lack of distinction has often led to

surprising disputes: the validity of an international arbitration clause which apparently did not conform with the definition—a somewhat singular definition at that—made under Egyptian domestic law has recently been challenged.

It will be appreciated here how useful the distinction between domestic arbitration and international arbitration would be in ensuring that the two were kept separate in countries where there is as yet little experience of international arbitration, with the result that the international is often equated with the extraterritorial.

It should not be thought surprising that even countries as sophisticated as Egypt should be capable of such backward moves. Did not international and foreign arbitration clauses suffer their ups and downs in Syria, where they were rejected initially only to become established later in response to pressure from international trade?

In Syria the initial reaction rejecting foreign arbitration was seen in 1972 when the Syrian *Cour de Cassation* decided, in a judgment dated 30 December 1972, that arbitration concerned with the shipping industry held outside Syrian territory (it was not made clear whether it was international or foreign arbitration) was not valid because it deprived the Syrian courts of all control over enforcement of the arbitration award. It was over three years before the Syrian *Cour de Cassation* relaxed this prohibition, holding that a foreign arbitration clause was recognized in so far as it was incorporated and expressly accepted in an instrument other than a bill of lading, where the insertion of an arbitration clause was prohibited under Syrian law. In the absence, at that time, of any court ruling laying down the principles to be applied, the Ministry of Justice in Damascus made frequent declarations to the effect that foreign arbitration clauses were valid as long as they were not contrary to Syrian public policy. Finally in this connection, mention should be made of a recent judgment (18 April 1983) in which the *Cour de Cassation* in Damascus held that a foreign arbitration was valid and that the Syrian courts had no jurisdiction over a dispute referred to foreign arbitration.

Similar problems have been encountered in Jordan, where an arbitration clause stipulating arbitration in Sweden contained in a commercial agency contract was ruled invalid by the Supreme Court in a judgment delivered on 20 September 1984. In this case, admittedly, it was not the principle of the arbitration clause that was disputed but its validity in the light of the exclusive jurisdiction by statute of the Jordanian courts in the field of commercial agency.

Conversely, on 22 February 1984, the Supreme Court in Amman held that, where there was an ICC arbitration clause, the Jordanian courts had no power to appoint arbitrators and that this was the exclusive right of the ICC Court of Arbitration, thus acknowledging that international arbitration existed *sui generis*.

Going further afield, to countries on the eastern edge of the Arabian Peninsula which have no legislation officially recognizing the distinction between domestic arbitration and international arbitration and have not yet subscribed to international or even regional conventions (specifically the Sultanate of Oman), one finds judgments dating back to 1981 in which international arbitration clauses are unequivocally recognized as valid. For instance, in a recent judgment, the courts in Oman refused to entertain certain disputes which, by the terms of ICC arbitration clauses, should have been settled by ICC arbitration. The Omani courts confined themselves to the application of interim protective measures. This is a striking example of the important role that a judiciously chosen human infrastructure can still play where there is as yet no statute law to provide guidance.

I shall now move on from arbitration clauses to examine very briefly the situation regarding the treatment of foreign arbitration awards in domestic laws. From this point of view the systems of the Arab Middle East countries can be divided into four main categories:

- The systems in which the legislation deals separately with the recognition and enforcement of foreign awards, without treating them on the same basis as foreign judgments. The countries with such systems are Lebanon and Libya.
- The systems in which the domestic legislation recognizes the principle of enforcement of foreign arbitration awards but applies the provisions on foreign judgments to them. The countries with such systems are Syria, Egypt, Kuwait and Bahrain.
- The systems in which the domestic laws do not recognize the principle of enforcement of foreign arbitration awards but contain provisions regulating the enforcement of foreign judgments. In practice this means that an award must be validated by a judgment in order to be enforced. The countries in this category are Iraq, Jordan, the United Arab Emirates and North Yemen.
- Finally, the systems in which the domestic laws contain no provisions on foreign judgments or foreign arbitration awards. The countries in this group are Qatar, Saudi Arabia and Oman. However, there are two positive features here:
  - (a) Saudi Arabia has already signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) (hereinafter ICSID Convention).
  - (b) In the Sultanate of Oman, which is not yet a signatory to any convention, the courts have recognized and enforced an international arbitration award without making any examination of the merits, as was mentioned earlier. This is another of the surprising aspects of the evolution of law in the Arab Middle East, where there can be unpredictable and sometimes positive developments.

Finally, it should be pointed out that, in parallel with their domestic laws, some States in the Arab Middle East have signed and ratified the New York Convention (Syria, Jordan, Egypt and Kuwait) and the ICSID Convention which, although confined exclusively to a certain category of dispute, has

greatly simplified the enforcement of arbitration awards made under its provisions. The States which have signed and ratified this latter Convention are, to the best of my knowledge, Jordan, Egypt, Kuwait, Saudi Arabia and the United Arab Emirates.

THIRD QUESTION: WHAT STEPS COULD BE TAKEN TO MAKE  
INTERNATIONAL ARBITRATION MORE READILY ACCEPTABLE  
TO ARAB PARTIES?

What conclusions can be drawn from this brief review, and what steps can be taken to make international arbitration more acceptable to Arab parties?

- (1) The first conclusion is that there can be no definitive conclusion and no forecast can be made when dealing with territories characterized by change, where the legal is overshadowed by the political.
- (2) It is not on the content of legislation but on the underlying realities that attention should be focused. At this stage the conclusion can best be expressed in the interrogative mode. Which are going to prove the stronger, nationalist tendencies or tendencies receptive to the West? Which is going to prevail, the generally close legal tradition of Islam or the pressure of international trade? These conflicting influences often give rise to paradoxical situations, such as that in Egypt, which was the first of these countries to sign the New York Convention, but where there is evidence of phagocytosis of the international arbitration clause by local provisions; such as that in Oman, whose courts enforce ICC awards even though it as yet has *no legislation* on the enforcement of awards.
- (3) A third conclusion must also be drawn at this stage. It is a corollary of the first. In the countries of the Arab Middle East, legal texts identical with those in force in the West take on different meanings when they come to be applied in practice. A legislative vacuum is often filled in judicial practice by local idiosyncrasies in which pressure from the executive power can be sometimes detected.

In the circumstances, what can be done to ensure that international arbitration is genuinely accepted by Arab parties? The answer is to be found not only in legislation, which can easily be imported from the West, but also on four levels:

- (a) *economic*: pressure of international trade; where such pressure exists, some momentum has already been gained;
- (b) *cultural*: comprehension and assimilation of legislation by the bodies which adopt and implement it;
- (c) *human*: the selection of Arab arbitrators, who should play a more active part in the settlement of disputes involving parties from the Middle East;
- (d) *geographical*: it is not enough, in my view, for arbitrators to be exported to the West; facilities should be made available for international arbitration to be established and conducted in the countries of the Arab Middle East.

However, if this last and most difficult objective is to be attained, the Arab States themselves must pave the way for the adoption of international



arbitration on their territories. In order to do this, they should show legal maturity and recognize that international arbitration enjoys some measure of autonomy. On the human plane, arbitrators should ensure that they do not allow their dissensions and personal views to obtrude into a field where neutrality and detachment are the rule. Set against problems of this caliber, the content of legislative texts is often of secondary importance.